NO. 20101

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BOBRICK CORPORATION,
Appellant,
vs.
AMERICAN DISPENSER CO., INC.,
Appellee.

BRIEF OF APPELLANT THE BOBRICK CORPORATION

APPEAL FROM
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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MAHONEY, HALBERT & HORNBAKER
THOMAS P. MAHONEY
4055 Wilshire Boulevard
Los Angeles, California 90005

Attorneys for Appellant
The Bobrick Corporation

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STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

The complaint alleges a cause of action for patent infringement against AMERICAN DISPENSER CO. and others (Tr. 2-4). The District Court had jurisdiction of the subject matter under 28 U.S.C. Section 1338(a).

The District Court entered a final order dismissing the action against AMERICAN DISPENSER CO. for lack of venue and jurisdiction over the person (Tr. 101-102). Plaintiff THE BOBRICK CORPORATION filed a timely Notice of Appeal (Tr. 108). This Court has jurisdiction to review the final order under 28 U.S.C.

Sections 1291 and 1292(4).

STATEMENT OF THE CASE

The complaint alleges a cause of action for patent infringement against AMERICAN DISPENSER COMPANY, BURTON L. FEINSON, the Treasurer and General Manager of AMERICAN DISPENSER COMPANY, and SHORE-ROBERTSON & ASSOCIATES, a co-partnership consisting of PHILIP SHORE and DAVID ROBERTSON (Tr. 2-4).

On November 12, 1964, the United States Marshal for the Southern District of California served the summons and complaint on AMERICAN DISPENSER COMPANY in Los Angeles by handing to and leaving true and correct copies with PHILIP SHORE, who plaintiff contends was AMERICAN's agent for service of process. 1/

At the same time, the United States Marshal for the Southern District of California served SHORE-ROBERTSON & ASSOCIATES in Los Angeles by handing to and leaving true and correct copies with PHILIP SHORE.

Also on November 12, 1964, the said United States Marshal served PHILIP SHORE individually.

On December 17, 1964, the United States Marshal for the

1/ The returns of service on all relevant defendants were omitted from the Transcript of Record. The parties have subsequently filed supplemental designations covering the returns on AMERICAN DISPENSER COMPANY, SHORE-ROBERTSON & ASSOCIATES, PHILIP SHORE and BURTON FEINSON.

Southern District of New York served BURTON L. FEINSON in New York.

AMERICAN defaulted on December 2, 1964 by failing to file an answer within twenty (20) days as required under Rule 12(a) of the Federal Rules of Civil Procedure.

On December 17, 1964, AMERICAN filed a declaratory judgment action on the same patent against the BOBRICK CORPORATION in Delaware (Tr. 31-32).

Later, on January 6, 1965, AMERICAN and BURTON L. FEINSON moved in California for an order "that the return of service of summons upon the defendant BURTON L. FEINSON and/or AMERICAN DISPENSER COMPANY, INC. in New York City be quashed for lack of jurisdiction over the person, and that this action be dismissed as to said defendants BURTON L. FEINSON and AMERICAN DISPENSER COMPANY, INC. for improper venue" (Tr. 11-12).

The Court dismissed the action against FEINSON and permitted the following limited discovery on the issue of venue under 28 U.S.C. Section 1400(b):

> "The plaintiff THE BOBRICK CORPORATION may proceed with discovery on the issue of whether AMERICAN DISPENSER COMPANY, INC. has committed acts of infringement and has a regular and established place of business within the Southern Judicial District of California." (Tr. 55.)

On April 8, 1965, the Court entered a final Order as follows:

> "IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant's motion is granted and the action against AMERICAN DISPENSER COMPANY, INC. is dismissed on the grounds that the Court does not have jurisdiction over the person of AMERICAN DISPENSER COMPANY, INC. because PHILIP SHORE is not an agent thereof for the service of summons in the State of California, and venue for patent infringement does not lie in this Judicial District under Section 1400(b) of Title 28, United States Code, because AMERICAN DISPENSER COMPANY, INC. does not reside in this Judicial District nor does it have a regular and established place of business therein." (Tr. 101-102).

The facts showing that PHILIP SHORE was an agent of AMERICAN for service of process, so far as known by plaintiff, are as follows:

AMERICAN now has its name on the front of the building at 5401 South Santa Fe Avenue in Los Angeles, California, the office of PHILIP SHORE & ASSOCIATES (Tr. 43; Dep. 29 [2]). AMERICAN receives mail at this address (Dep. 28-29).

AMERICAN is listed in the Los Angeles Telephone Directory and the Yellow Pages thereof under a former address, 7701 E.

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[2] Reference is to page 29 of the Deposition of PHILIP SHORE taken on March 2, 1965.

Compton in Paramount, California (Tr. 44-45). This address and telephone number was the same as PHILIP SHORE & ASSOCIATES (Dep. 55-56).

From November 1960 to October 1964, AMERICAN advertised 7701 E. Compton as its "WESTERN SALES OFFICE" (Dep. 27 and Dep. Exhibits 5-D, 5-E, 5-F, 5-I, 5-J, 5-K and 5-L). AMERICAN also received mail at this address (Dep. 28).

From April 1956 to November 1960, AMERICAN advertised 2881 E. Pico Boulevard, Los Angeles, California as its "WEST COAST SALES OFFICE" (Dep. Exhibits 3, 4, 5-A, 5-B, 5-C). This was also the address of PHILIP SHORE & ASSOCIATES (Dep. 48).

AMERICAN had a booth at the NSSA West Coast Trade Show in Los Angeles on October 24 and 25, 1964 (Dep. Exhibit 2). Mr. BURTON FEINSON, the General Manager of AMERICAN, was in the booth and SHORE-ROBERTSON took orders there (Dep. 42).

There are undoubtedly many more similar facts of which plaintiff is not aware because, as previously pointed out, the Court prohibited discovery on the issue of jurisdiction over the person.

SPECIFICATION OF ERRORS

1. The Court erred in dismissing the action against AMERICAN DISPENSER COMPANY, INC. for lack of jurisdiction over the person.

2. The Court erred in dismissing the action against

AMERICAN for lack of venue.

SUMMARY OF ARGUMENT

1. AMERICAN did not move to dismiss for lack of jurisdiction over its person arising out of the service on PHILIP SHORE in California. AMERICAN thereby waived any objection to such jurisdiction.

2. AMERICAN defaulted by not answering the complaint within twenty (20) days. It therefore had no standing to challenge venue.

ARGUMENT

I

AMERICAN WAIVED JURISDICTION OVER ITS PERSON ARISING OUT OF SERVICE IN CALIFORNIA.

The law is clear that jurisdiction over the person may be waived. IA Federal Practice and Procedure by Barron and Holtzoff, Section 370, pp. 509-510.

AMERICAN moved under Rule 12 of the Federal Rules of Civil Procedure to dismiss for lack of venue and lack of jurisdiction over its person arising out of service on FEINSON in New York City; AMERICAN did not move to dismiss for lack of jurisdiction over its person arising out of service on PHILIP SHORE in Los Angeles. AMERICAN thereby waived its objections to service in Los Angeles

under Rule 12(g) and (h) of the Federal Rules of Civil Procedure as follows:

> "(g) CONSOLIDATION OF DEFENSES. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted. . . .
>
> "(h) WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, . . ."

AMERICAN attempted to rectify this waiver in the Order, prepared by it under Local Rule 7(a), which states, as previously set forth, that "the action against AMERICAN DISPENSER COMPANY, INC. is dismissed on the grounds that the Court does not have jurisdiction over the person of AMERICAN DISPENSER COMPANY, INC. because PHILIP SHORE is not an agent thereof for the service of summons in the State of California". So, AMERICAN succeeded in having the action dismissed on grounds it had waived and without making a motion directed to said grounds. Worst of all,

AMERICAN got the action dismissed without plaintiff having had any discovery on the issue of jurisdiction over the person, which involves several provisions of the Federal Rules of Civil Procedure, as well as State Law. Rule 4(d)(3) provides that service shall be made upon a foreign corporation by delivering a copy of the summons and complaint to "a managing or general agent, or to any other agent authorized by appointment to receive service of process". Rule 4(d)(7) provides that it is also sufficient if the summons and complaint are served in the manner prescribed "by the law of the State in which the District Court is held". This, in turn, requires application of the California Code of Civil Procedure Section 411(2), which provides that a summons must be served on a foreign corporation in the manner provided in the Corporations Code. Section 6500 of the Corporations Code says that a foreign corporation may be served by delivery by hand of a copy of the process to "the general manager in this State".

In Cosper v. Smith & Wesson Arms Co., 53 Cal.2d 77, 346 P.2d 409 (1959), the California Supreme Court held that service on a manufacturer's representative was sufficient. The Court there said:

> "Plaintiff claims that the admitted activities of Smith and Wesson in this state establish that it was 'doing business' here so as to be amenable to the service of process, and that proper service was effected upon it by serving Lookabaugh. He further contends that the court's contrary findings are not

supported by the evidence but constitute only erroneous conclusions of law. The single affidavit filed in support of Smith and Wesson's motion to quash service was that of its president. Despite the document's conclusionary averments, the facts that it recites disclose that Smith and Wesson had sufficient contacts with this state to render it amenable to such service of process.

"This affidavit recites that Smith and Wesson, Inc. is a Massachusetts Corporation with offices in Springfield and is not qualified to do business in this state; that it 'has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints against (it) in California'; that it has no offices nor any property or assets in this state; that it 'does not solicit retail business, but distributes its products F. O. B. Springfield through regular wholesale and dealer channels. Sales promotions are principally conducted by long established firms known as manufacturer's representatives which on their own time and expense solicit business in several allied lines against an overriding discount, or commission, on business initiated by them'; that the 'Walter Lookabaugh Co. of California and its predecessor, the Paul S. Linforth Co. have been known

to us as general manufacturer's representatives specializing in the sporting goods field'; that there is no contract with Lookabaugh Company except that they were 'to promote on a non-exclusive basis the sale of our products on the West coast against a straight commission of 5%'; that Smith and Wesson, Inc., has no financial interest in the Lookabaugh Company nor any control over this company or its employees; that Lookabaugh Company buys its own samples and 'no help or assistance is given them by Smith and Wesson, Inc., except such advertising material as is furnished by Smith and Wesson, Inc. to the general jobbing trade throughout the world'.

"This affidavit discloses that Smith and Wesson's products are distributed in California, that Lookabaugh Company, a manufacturer's representative, promoted its business here though not on an exclusive basis, and distributed general advertising matter furnished by Smith and Wesson. It therefore appears that the material factual averments of defendant's affidavit do not contradict but rather coincide with plaintiff's extended showing of Smith and Wesson's activities in this state through its agreement with Lookabaugh for servicing dealer accounts, investigating and recommending prospective dealers to Smith and Wesson, arranging publicity, distributing

advertising, and handling and reporting on complaints concerning defects in Smith and Wesson's products. In short, this is not a true case of conflicting evidence in which a reviewing court will refuse to disturb findings based thereon. . . .

"From the record it indisputably appears that Smith and Wesson had a continuing arrangement for the distribution and sale of its products throughout this state. Said defendant had retained a manufacturer's representative, Lookabaugh, for the promotion of sales, for the servicing of dealer accounts, and for the distribution of advertising material which defendant furnished in furtherance of its selling activity. Such a regular course of business dealings in sales promotion within the state is similar to the regular purchasing activities of the foreign corporation in the Jahn case and the regular selling activities of the foreign corporation in the Borgward case. Though self-employed as a manufacturer's representative, Lookabaugh was performing much the same type of substantial selling services for Smith and Wesson through a course of regularly-established and systematic business activity as were deemed in Gray v. Montgomery Ward, Inc., 155 Cal.App. 2d 55 (317 P.2d 114), to constitute 'doing business' in the state by the foreign corporation there involved.

These services may reasonably be said to have given Smith and Wesson 'in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force.' (Sales Affiliates, Inc. v. Superior Court, 96 Cal. App. 2d 134, 136 (214 P. 2d 541). Certainly, the admitted activities of Smith and Wesson in this state are more significant than the minimal contacts deemed sufficient in McGee v. International Life Ins. Co., 355 U. S. 220 S.Ct. 199, 2 L. Ed. 2d 223), where the foreign corporation elected to deal with its insured, a California resident, only by mail.

"It further appears that the gun which exploded was sold in this state, the accident occurred in this state, the plaintiff is a resident of this state, and many of the witnesses who will probably be called at the trial are present in this state. Therefore, in view of all of the facts, we deem it not inconsistent with 'traditional notions of fair play and substantial justice' to subject the defendant Smith and Wesson to the jurisdiction of the courts of this state in this action.

"The second consideration in testing the validity of service under section 6500 of the Corporations Code is whether the person served is within the statutory designation -- here 'the general manager

in this state' for Smith and Wesson. In this regard, it has been said that 'every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made,' and by service on such an agent, 'the requirement of the statute is answered.' (Eclipse Fuel Eng. Co. v. Superior Court, supra, 148 Cal. App. 2d 736, 746.) Whether in any given case, the person served may properly be regarded as within the concept of the statute depends on the particular facts involved. (Ibid; Milbank v. Standard Motor Const. Co., 132 Cal.App. 67, 71 (aa P. 2d 271); Roehl v. Texas Co., 107 Cal. App. 691, 704 (291 P. 255).) Here, it reasonably appears that Lookabaugh as a manufacturer's representative actively engaged in promoting the sales of Smith and Wesson and earning commissions through such sales, would have ample regular contact with Smith and Wesson and would be of 'sufficient character and rank to make it reasonably certain' that Smith and Wesson would be apprised of the service of process. Neither the fact that Lookabaugh's organization was designated as 'manufacturer's representatives' nor the fact that such representatives promoted sales 'on their own time and expense' is determinative here. Whether Smith and Wesson was operating 'through an

independent contract, agent, employee or in any other manner.' (Gray v. Montgomery Ward, Inc., supra, 155 Cal. App.2d 55, 58; Fielding v. Superior Court, 111 Cal. App.2d 490, 494 (244 P. 2d 968); see also Eclipse Fuel Eng. Co. v. Superior Court, supra, 148 Cal. App.2d 736, 740), the essential factor is that Lookabaugh in his selling and advertising activities was performing services for Smith and Wesson and providing it with the opportunity for 'regular contact with its customers and a channel for a continuous flow of business into the state.' (Sales Affiliates, Inc. v. Superior Court, supra, 96 Cal. App. 2d 134, 136) In short, the arrangement of Smith and Wesson with Lookabaugh appears, in the light of the president's affidavit, to have given Smith and Wesson substantially the business advantages that it would have enjoyed 'if it conducted its business through its own offices or paid agents in the state' (Eclipse Fuel Eng. Co. v. Superior Court, supra, 148 Cal. App. 2d 736, 740); and such arrangement was sufficient to constitute Lookabaugh 'the general manager in this state' for purposes of service of process on Smith and Wesson. (Corp. Code, Section 6500.)" (Emphasis added.)

In the instant case, AMERICAN admits that SHORE-ROBERTSON seels substantial quantities of its products in California.

Furthermore, the infringing sale occurred in this state, plaintiff is a California corporation and many witnesses who will probably be called at trial are present in California. As a matter of California law, on the facts already known, the District Court had jurisdiction over the person of AMERICAN. But even if this Court disagrees, surely the District Court abused its discretion by deciding the question without first permitting discovery and a hearing. Cf. Ziegler v. Standard Oil, 32 F. R. D. 241, 135 USPQ 350, 251 (N. D. Calif. 1962).

One other point: AMERICAN can apparently still raise jurisdiction over its person by answer. Phillips v. Baker, 121 F.2d 752, 50 USPQ 540, 541-542 (9th Cir. 1941). However, plaintiff urges the Court to overrule Phillips v. Baker, supra, in view of the criticism levelled at it by most of the Courts and writers who have considered it. Elbinger v. Precision Metal Workers, 18 F. R. D. 467, 469 (E. D. Wis. 1956); Keefe v. Derounian, 6 F. R.D. 11, 13 (N. D. Ill, 1946); Crum v. Graham, 32 F. R. D. 173, 175 (D. Mont. 1963); 1 A Federal Practice and Procedure by Barron and Holtzoff, Section 370, pp. 524-525; 1 Moore's Federal Practice, Para. 12. 23 pp. 2327-2328, note 2.

II

AMERICAN HAD NO STANDING TO CHALLENGE VENUE AFTER DEFAULTING.

In Orange Theatre Corp. v. Rayherstz Amusement Corp., 130 F. 2d 185, 6 FR Serv. 66. 12, Case 1 (3rd Cir. 1942), the

defendants moved to dismiss for lack of venue after defaulting. The District Court granted the motion. The Court of Appeals reversed, saying:

> "We have then this situation: the stipulations extending the time were ineffective and the defendants are in the position of having failed to plead or otherwise to defend within the twenty days allotted under Rule 12(a). They are, therefore, in default. There has been no entry of default in accordance with Rule 55(a). But that entry is a purely formal matter. When this case is remanded the defendants may apply to the trial judge to be permitted to answer under Sections 55(c) and 60(b) of the Rules."

The importance of the outlined procedure is this: Rule 55(c) requires a showing of "good cause" for relief from default. So far, AMERICAN has given no explanation other than apparently being busily engaged in the preparation of the Delaware declaratory judgment action.

Respectfully submitted,

MAHONEY, HALBERT & HORNBAKER

THOMAS P. MAHONEY

Attorneys for Appellant
The Bobrick Corporation

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Thomas P. Mahoney
THOMAS P. MAHONEY